STATE OF INDIANA

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MAY 09 2005

INDIANA UTILITY REGULATORY COMMISSION

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IN THE MATTER OF THE PETITION OF INDIANA BELL TELEPHONE COMPANY INCORPORATED D/B/A SBC INDIANA FOR PROTECTION OF CONFIDENTIAL AND PROPRIETARY INFORMATION) **CAUSE NO. 42797**

You are hereby notified that on this date the Presiding Officer in this Cause made the following Entry:

On March 1, 2005, Indiana Bell Telephone Company, Incorporated d/b/a SBC Indiana ("SBC Indiana") filed its *Petition* ("Petition") with the Indiana Utility Regulatory Commission ("Commission"), seeking confidential treatment of certain sections of an affiliate agreement and subsequent amendments thereto, which were filed by SBC pursuant to I.C. 8-1-2-49(2). That section specifies that "[n]o management, construction, engineering, or similar contract, made after March 8, 1933, with any affiliated interest, as defined in this section, shall be effective unless it shall first have been filed with the Commission."

The affiliate agreement cited is between SBC and SNET Diversified Group, Inc. ("SNET DG"), a wholly owned subsidiary of SBC Communications, and is described as an Intelligent Network Gateway Service Agreement, including First, Second, Third, and Fourth Amendments. The original agreement was filed with the Commission on June 10, **2003**. SBC Indiana seeks confidential protection pursuant to I.C. 8-1-2-29, the Commission's procedural rule found at 170 I.A.C. 1-1.1-4, and the trade secret exception to public disclosure of public records found at I.C. 5-14-3-4 and I.C. 24-2-3-2.

The Commission rule found at 170 I.A.C. 1-1.1-4 establishes procedures for claiming that material to be submitted to the Commission is confidential. This rule, among other requirements, states that a written application for a finding of confidentiality must be filed on or before the date the material is required to be filed (170 I.A.C. 1-1.1-4(a)), and the application shall be accompanied by a sworn statement or testimony that describes: the nature of the confidential information, the reasons why the material should be treated as confidential pursuant to I.C. 8-1-2-29 and I.C. 5-14-3, and the efforts made to maintain the confidentiality of the material. 170 I.A.C. 1-1.1-4(b). Material filed with or submitted to the Commission *prior to a finding of confidentiality is available for public inspection and copying*. 170 I.A.C. 1-1.1-4(e).

Ten (10) days following receipt of an application for confidentiality the Commission may: (1) find the information to be confidential in whole or in part; (2) find

the information not to be confidential in whole or in part; (3) issue a protective order or docket entry covering the information; and/or (4) find that information found to be not confidential should be filed in accordance with 170 I.A.C. 1-1.1-4. 170 I.A.C. 1-1.1-4(a). The Presiding Officer or any party may request an *in camera* inspection to hear argument on confidentiality of the material. 170 I.A.C. 1-1.1-4(c).

I.C. 8-1-2-29, a statute of specific applicability to the Commission, recognizes the relevancy of the Access to Public Records Act to the Commission's public records. I.C. 8-1-2-29(a) states:

> All facts and information in the possession of the commission and all reports, records, files, books, accounts, papers, and memoranda of every nature whatsoever in its possession shall be open to inspection by the public at all reasonable times subject to I.C. 5-14-3.

Indiana's Access to Public Records Act, found at I.C. 5-14-3, begins with an unambiguous policy statement that favors public disclosure of government information. I.C. 5-14-3-1 states:

> A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

The Indiana Utility Regulatory Commission, by application of the definition found at I.C. 5-4-3-2, is a "public agency:"

> "Public agency" means the following:
>
> (1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

I.C. 5-14-3-2 broadly defines a "Public record" as:

> ...any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained,

used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

A public agency must make its public records available for inspection and copying. "Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter." I.C. 5-14-3-3(a). That section contains two (2) lists of public records that are nondisclosable. The first list, found at I.C. 5-14-3-4(a), describes those public records that a public agency may not disclose, unless access is specifically required by state or federal statute or ordered by a court under the rules of discovery. The second list, found at I.C. 5-14-3-4(b), describes public records that are nondisclosable at the discretion of a public agency. The public records at issue in this proceeding are public records that are claimed to contain trade secrets. "Records containing trade secrets" are excepted from public disclosure under I.C. 5-14-3-4(a)(4) and, therefore, fall within the category of public records that a public agency may not disclose.

The Access to Public Records Act, at I.C. 5-14-3-2, states that "[t]rade secret' has the meaning set forth in IC 24-2-3-2." Indiana's adoption of the Uniform Trade Secrets Act is found at I.C. 24-2-3, and contains the following definition:

> 'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> **(1)** derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; **and**
>
> (2) **is the subject of efforts that are reasonable under the circumstances to maintain its secrecy**.
>
> (Emphasis added.)

Indiana Courts describe trade secret information as containing four (4) elements: 1) information; 2) deriving independent economic value; 3) not generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and 4) the subject of efforts, reasonable under the circumstances to maintain its secrecy. *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 813 (Ind. App. 2000.) For purposes of a request for confidential treatment, we require factual information sufficient to satisfy the requirements of 170 I.A.C. 1-1.1-4 and each of the elements comprising the statutory definition of trade secret.

SBC's Petition states as follows in support of the requested relief:

> The parties to the Agreement consider it to contain confidential and proprietary information...containing competitively sensitive terms, conditions, descriptions of business practices and pricing information to be proprietary and confidential. This information...(i) is such that it may derive actual and potential independent economic value from being neither generally known to, nor readily ascertainable by, persons who could obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Such Confidential Information, if disclosed to competitors or otherwise made publicly available, would have substantially detrimental effect on the parties to the agreement. The Confidential Information therefore constitutes a trade secret under Indiana law and is entitled to protection from disclosure by the Commission.
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> *Petition*, ¶6.

This assertion facially meets the test for a finding of a protectable trade secret. However, the documents have been in the public record for two years, and as such have *not* been subject to reasonable efforts to maintain secrecy. Trade secret law only protects information that is kept secret, and an owner must take "reasonable, though not extravagant, measures to protect its secrecy." *Flotec, Inc. v. Southern Research, Inc.* 16 F. Supp.2d 992, 999-1000 (S.D. Ind. 1998). Submission of documents to a public agency for a period of two years does not fall into the category of measures designed to maintain secrecy. While SBC itself may take measures to maintain the secrecy of the information in the affiliate agreement, those actions can be, and have been, undone by the filing with the Commission. The Court in *Flotec* noted that Flotec had taken substantial internal measures to maintain the secrecy of the given information. However, the Court went on to say:

> Flotec did not take the most elementary steps to protect the technical drawings it provided to SRI. The drawings did not bear a legend that they were confidential. Flotec did not ever tell SRI that it considered the information confidential, let alone obtain a confidentiality agreement when it provided the information to SRI, and Flotec never sought assurances from SRI that it would keep the information confidential...These circumstances strongly indicated that Flotec failed to take reasonable steps to maintain the secrecy of the allegedly valuable information and thus weigh heavily against the claim that Flotec is entitled to trade secret protection for any of the information it disclosed to SRI.

Id. at 1004-05.

While this language applied in the context of a competitor's use of the information, the analogy to documents submitted to a public agency holds. SBC is required by the clear language of the rules to ask for trade secret protection and confidential treatment *before* the filing of a document with the Commission.[1] "[O]nce

[1] We note cases that have held that a trade secret will not be deprived of its defined protection by an inadvertent filing in a court record. However, those cases are factually distinguishable to the one at bar. In

material is publicly disclosed, it loses any status it ever had as a trade secret." *Catalyst & Chemical Services, Inc. v. Global Ground Support,* 350 F. Supp.2d 1, 9 (D.D.C. 2004), *citing State ex rel. Rea v. Ohio Dep't of Educ.,* 81 Ohio St.3d 527, 692 N.E.2d 596, 601(Ohio 1998), *citing Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1002, 81 L.Ed.2d 815, 104 S. Ct. 2862(1984).

Wherefore, the Presiding Officer, having read SBC's Motion and being duly advised in the premises, hereby denies the requested relief.

IT IS SO ORDERED.

Lorraine Hitz-Bradley, Administrative Law Judge

May 9, 2005

Date

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those circumstances, confidential treatment was requested by the affected party, and for one reason or another, the document was nonetheless placed in a position of becoming a public record. In those circumstances, the affected party took *immediate* steps to have the allegedly confidential material removed, redacted, or protected. It is the brevity of the exposure, and the previous actions by the party, that distinguish those cases from this situation. See, *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.,* 174 F.3d 411 (4th Cir. 1999)(inadvertent filing, followed by request for injunction, did not destroy trade secret protection); *Bobrow v. Bobrow,* 810 N.E.2d 726 (Ind. App. 2004)(where parties agreed to confidentiality of exhibits in divorce proceeding, the submission of documents into evidence, and subsequent Public Records request, did not extinguish trade secret protection, and record was sealed; party asserting trade secret protection immediately raised issue.) Documents on file at a public agency for nearly two (2) years do not fall into this category of exceptions. The decision to deny confidential treatment is consistent with prior Commission rulings, finding that documents already on file at the Commission are public records. *Petition of Metrocom for Confidential and Proprietary Treatment of Portions of its Local Exchange Carrier Annual Report for the Year Ending December 31, 2003, et al.,* Cause No. 42625, 2004 Ind. PUC LEXIS 252 at 15-16 (order dated June 30, 2004).